

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
*Protecting Texas by Reducing and Preventing Pollution*

**May 31, 2011**

Melissa Chao, Acting Chief Clerk  
Texas Commission on Environmental Quality  
Attention: Docket Clerk, MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Enforcement Action  
David Higginbotham and Katha Higginbotham  
TCEQ Docket No. 2010-0157-PST-E; SOAH Docket No. 582-11-0541

Dear Ms. Chao:

Enclosed please find eight copies of the Executive Director's Exceptions to the Proposed Order for the above-referenced case. Please file the original and return one date-stamped copy to Tammy L. Mitchell, Attorney, Litigation Division, MC 175.

Please contact me at (512) 239-3400 with any questions you may have. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tammy L. Mitchell".

Tammy L. Mitchell  
Attorney  
Litigation Division

Enclosures

cc: The Honorable Rebecca S. Smith, State Office of Administrative Hearings, Via  
Facsimile No. (512) 322-2061 and via Interagency Mail  
Roshandra Lowe, Enforcement Division, TCEQ, MC R-12  
Todd Thompson, Waste Section Manager, TCEQ, MC R-12  
Blas J. Coy, Jr., Attorney, Office of Public Interest Counsel, TCEQ, MC 103



**SOAH DOCKET NO. 582-11-0541  
TCEQ DOCKET NO. 2010-0157-PST-E**

**EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER**

**VS.**

**DAVID HIGGINBOTHAM AND  
KATHA HIGGINBOTHAM;  
RN101728798;  
RESPONDENTS**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**BEFORE THE**

**STATE OFFICE OF**

**ADMINISTRATIVE HEARINGS**

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSED ORDER**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ"), by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") proposed order issued May 18, 2011:

1. The Executive Director respectfully requests that Finding of Facts No. 2 of the Proposed Order be amended to reflect that there are three (3) underground storage tanks ("UST") at the Facility, not four (4). ED's Exh. 1 at 12-17; Testimony of Jocina Chase at 21:54 and 22:53.

**PRAYER**

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director's Exceptions to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

Respectfully submitted,

Texas Commission on Environmental  
Quality

Mark R. Vickery, P.G.  
Executive Director

Stephanie Bergeron Perdue, Deputy  
Director  
Office of Legal Services

Kathleen C. Decker, Director  
Litigation Division

by 

Tammy L. Mitchell  
State Bar of Texas No. 24058003  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3400 / Fax (512) 239-0626

### CERTIFICATE OF SERVICE

I hereby certify that on this 31<sup>st</sup> day of May, 2011, the original and 7 copies of the foregoing "Executive Director's Exceptions to the Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions were sent to the following:

The Honorable Rebecca S. Smith  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

Via Facsimile to 322-2061 without  
Attachments and Via Interagency Mail  
with Attachments

David and Katha Higginbotham  
11231 Rose Road  
Conroe, Texas 77303

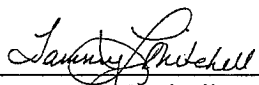
Via Certified Mail Article No. 7002  
0860 0000 9040 8503, and First Class  
Mail with Attachments

Les Trobman  
TCEQ General Counsel

MC 101

Blas Coy  
TCEQ Public Interest Counsel

Via Electronic Mail with Attachments

  
\_\_\_\_\_  
Tammy Mitchell  
Attorney  
Litigation Division  
Texas Commission on Environmental  
Quality

## ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
David Higginbotham and Katha Higginbotham  
TCEQ DOCKET NO. 2010-0157-PST-E  
SOAH DOCKET NO. 582-11-0541**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action from David Higginbotham and Katha Higginbotham (Respondents). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 21, 2011, in Austin, Texas, and presented the Proposal for Decision.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. David and Katha Higginbotham (Respondents) own a former gasoline station located at 11231 Rose Road, Conroe, Montgomery County, Texas (Facility).
2. Respondents own ~~four~~ three underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

3. On July 19, 2007, TCEQ Investigator Janie Munoz conducted an inspection of the Facility and determined that Respondents had committed one violation of the TCEQ rules regarding USTs.
4. On August 27, 2007, the TCEQ issued a Notice of Violation to Respondents.
5. On October 30, 2009, TCEQ Investigator Jocina Chase conducted a follow-up inspection and determined that Respondents remained in violation of the TCEQ rules.
6. On November 5, 2009, the TCEQ issued a second Notice of Violation to Respondents.
7. On December 22, 2009, Ms. Chase conducted a second follow-up record review and determined that Respondents had not corrected their alleged violation.
8. On January 13, 2010, the TCEQ issued a Notice of Enforcement to Respondents.
9. On July 16, 2010, the ED filed a Preliminary Report and Petition (EDPRP) with the Commission's Chief Clerk and mailed a copy of it by U.S. first class mail and certified mail, return receipt requested, to Respondents at 11231 Rose Road, Conroe, Texas 77303. The Preliminary Report and Petition alleged that Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2).
10. On August 6, 2010, Respondents requested a contested case hearing on the allegations in the EDPRP, and on October 1, 2010, the Chief Clerk referred this dispute to SOAH for hearing.
11. A Notice of Preliminary Hearing was issued on October 15, 2010.
12. A preliminary hearing was held on November 18, 2010, before ALJ Rebecca S. Smith at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
13. The evidentiary hearing convened on March 21, 2011, before ALJ Rebecca S. Smith also at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.



The ED was represented by Staff Attorney Tammy Mitchell. Respondents represented themselves. The record closed that day.

14. Respondents failed to remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
15. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$2,750.
16. An administrative penalty of \$2,750 takes into account the factors contained in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day for the violations alleged in this proceeding.
3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12,

39.25, 70.104, and 80.6, Respondents were notified of the hearing on the alleged violation and the proposed penalties and corrective actions.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law, Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith;
  - The economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting out its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$2,750 is justified and should be assessed against Respondents.

11. Based on the above Findings of Fact, Respondents should be required to take the corrective action that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall pay an administrative penalty in the amount of \$2,750 for the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2). The payment of this administrative penalty and compliance with all the terms and conditions set forth in this Order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here.

Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: David and Katha Higginbotham, TCEQ DOCKET NO. 2010-0157-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.
3. Within 45 days after the effective date of this Order, David and Katha Higginbotham shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate

compliance with Ordering Provision paragraph 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Waste Section Manager  
Houston Regional Office  
Texas Commission on Environmental Quality  
5425 Polk Avenue, Suite H  
Houston, Texas 77023-1486

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to David and Katha Higginbotham if the Executive Director determines that Mr. and Mrs. Higginbotham have not complied with one or more of the terms or conditions in this Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to David and Katha Higginbotham.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

---

**Bryan W. Shaw, Ph.D., Chairman  
For the Commission**



## **ATTACHMENT B**





**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
David Higginbotham and Katha Higginbotham  
TCEQ DOCKET NO. 2010-0157-PST-E  
SOAH DOCKET NO. 582-11-0541**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action from David Higginbotham and Katha Higginbotham (Respondents). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 21, 2011, in Austin, Texas, and presented the Proposal for Decision.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. David and Katha Higginbotham (Respondents) own a former gasoline station located at 11231 Rose Road, Conroe, Montgomery County, Texas (Facility).
2. Respondents own three underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

3. On July 19, 2007, TCEQ Investigator Janie Munoz conducted an inspection of the Facility and determined that Respondents had committed one violation of the TCEQ rules regarding USTs.
4. On August 27, 2007, the TCEQ issued a Notice of Violation to Respondents.
5. On October 30, 2009, TCEQ Investigator Jocina Chase conducted a follow-up inspection and determined that Respondents remained in violation of the TCEQ rules.
6. On November 5, 2009, the TCEQ issued a second Notice of Violation to Respondents.
7. On December 22, 2009, Ms. Chase conducted a second follow-up record review and determined that Respondents had not corrected their alleged violation.
8. On January 13, 2010, the TCEQ issued a Notice of Enforcement to Respondents.
9. On July 16, 2010, the ED filed a Preliminary Report and Petition (EDPRP) with the Commission's Chief Clerk and mailed a copy of it by U.S. first class mail and certified mail, return receipt requested, to Respondents at 11231 Rose Road, Conroe, Texas 77303. The Preliminary Report and Petition alleged that Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2).
10. On August 6, 2010, Respondents requested a contested case hearing on the allegations in the EDPRP, and on October 1, 2010, the Chief Clerk referred this dispute to SOAH for hearing.
11. A Notice of Preliminary Hearing was issued on October 15, 2010.
12. A preliminary hearing was held on November 18, 2010, before ALJ Rebecca S. Smith at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
13. The evidentiary hearing convened on March 21, 2011, before ALJ Rebecca S. Smith also at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.

The ED was represented by Staff Attorney Tammy Mitchell. Respondents represented themselves. The record closed that day.

14. Respondents failed to remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
15. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$2,750.
16. An administrative penalty of \$2,750 takes into account the factors contained in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day for the violations alleged in this proceeding.
3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12,

39.25, 70.104, and 80.6, Respondents were notified of the hearing on the alleged violation and the proposed penalties and corrective actions.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law, Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith;
  - The economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting out its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$2,750 is justified and should be assessed against Respondents.

11. Based on the above Findings of Fact, Respondents should be required to take the corrective action that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall pay an administrative penalty in the amount of \$2,750 for the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2). The payment of this administrative penalty and compliance with all the terms and conditions set forth in this Order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: David and Katha Higginbotham, TCEQ DOCKET NO. 2010-0157-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.
3. Within 45 days after the effective date of this Order, David and Katha Higginbotham shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate

compliance with Ordering Provision paragraph 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Waste Section Manager  
Houston Regional Office  
Texas Commission on Environmental Quality  
5425 Polk Avenue, Suite H  
Houston, Texas 77023-1486

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to David and Katha Higginbotham if the Executive Director determines that Mr. and Mrs. Higginbotham have not complied with one or more of the terms or conditions in this Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to David and Katha Higginbotham.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

---

**Bryan W. Shaw, Ph.D., Chairman  
For the Commission**

